IN THE UNITED STATES ARMY
FIRST JUDICIAL CIRCUIT

UNITED STATES	)	
	)	**DEFENSE MOTION FOR**
v.	)	**DIRECTED VERDICT:**
	)	**SPECIFICATION 16 OF**
MANNING, Bradley E., PFC	)	**CHARGE II (THE USF-I**
U.S. Army, (b) (7)(C)	)	**GLOBAL ADDRESS LIST)**
Headquarters and Headquarters Company, U.S.	)	
Army Garrison, Joint Base Myer-Henderson Hall,	)	DATED: 4 July 2013
Fort Myer, VA 22211	)	

RELIEF SOUGHT

1. COMES NOW PFC Bradley E. Manning, by counsel, pursuant to applicable case law and Rule for Courts Martial (R.C.M.) 917(a), requests this Court to enter a finding of not guilty for Specification 16 of Charge II.

STANDARD

2. A motion for a finding of not guilty should be granted when, viewing the evidence in the light most favorable to the prosecution, there is an "absence of some evidence which, together with all reasonable inferences and applicable presumptions, could reasonably tend to establish every essential element of an offense charged." R.C.M. 917(d).

ARGUMENT

3. In Specification 16 of Charge II, the Government alleges that PFC Manning stole or knowingly converted the United States Forces Iraq (USF-I) Microsoft Outlook and SharePoint Exchange Server Global Address List (GAL). The Government has not presented evidence which, together with all reasonable inferences and applicable presumptions, could reasonably tend to establish every essential element of Specification 16 of Charge II.

4. The Defense adopts and incorporates by reference the arguments made in its Motion for Directed Verdict: Charge II, Specifications 4, 6, 8, 12 (18 U.S.C. §641 Offenses) (Defense §641 Motion).[1] In particular, the Defense notes that the Government has not charged that PFC Manning stole or converted "information" contained within the USF-I GAL or that PFC Manning stole or converted "a copy" of the USF-I GAL. This omission is significant both because it changes the identity of the item allegedly stolen or converted and its valuation. For the reasons identified the Defense §641 Motion, and for the additional reasons outlined below, the Defense requests that this Court enter a finding of not guilty.

[1] It is suggested that the Court read Defense §641 Motion prior to reading this motion.

APPELLATE EXHIBIT 596
PAGE REFERENCED: _____
PAGE ___ OF ___ PAGES

5. The Government has adduced forensic evidence that email addresses containing the term ".mil" were found in the unallocated space in PFC Manning's personal Macintosh computer. *See* Testimony of Mr. Johnson. The Government has provided absolutely no evidence that these ".mil" addresses were, in fact, the USF-I GAL which it alleges PFC Manning stole or converted. *See* Charge Sheet ("In that Private First Class Bradley E. Manning, U.S. Army, did, at or near Contingency Operating Station Hammer, Iraq, between on or about 11 May 2010 and on or about 27 May 2010, steal, purloin, or knowingly convert to his use or the use of another, a record or thing of value of the United States or of a department or agency thereof, to wit: *the United States Forces - Iraq Microsoft Outlook / SharePoint Exchange Server global address list* belonging to the United States government, of a value of more than $1,000, in violation of 18 U.S. Code Section 641, such conduct being prejudicial to good order and discipline in the armed forces and being of a nature to bring discredit upon the armed forces.") (emphasis added).

6. The Government called no witnesses to testify that they compared the addresses found in the unallocated space of PFC Manning's computer to the USF-I GAL as it existed on a certain date. *See* Stipulation of Expected Testimony of SA Williamson ("... revealed a large text file that *appeared to be* an extract of a Microsoft Exchange GAL" (emphasis added); "I did not contact any individual who could have given me the actual Iraq GAL, nor did I compare the data in the files recovered from the above files with the actual Iraq GAL."). Without any such evidence, the Government has introduced no evidence that would tend to establish that PFC Manning stole or converted the USF-I GAL.

7. More importantly, the Government's own witness testified that the USF-I GAL contained 160,000 email addresses and that the number of email addresses found in the unallocated space of PFC Manning's computer totaled 24,000. *See* 17 June 2013 Testimony of Chief Nixon. When Chief Nixon was called to testify a second time, he testified that what he viewed on PFC Manning's computer was not the USF-I GAL. *See* 28 June 2013 Testimony of Chief Nixon. Instead, Chief Nixon testified that he believed (though did not verify) that the .mil addresses on PFC Manning's computer were part of the Division GAL. *Id.* The testimony from Chief Nixon definitively proves that whatever was on PFC Manning's computer, it was not the USF-I GAL.

8. Perhaps the Government intends to argue that PFC Manning stole or converted *part* of the USF-I GAL or that PFC Manning stole or converted the Division GAL. However, the Government has not charged PFC Manning with stealing or converting *part of* the USF-I GAL or with stealing or converting the Division GAL— it has charged him with stealing *the* USF-I GAL itself. *See* Charge Sheet. Stealing or converting the USF-I GAL and stealing or converting the Division GAL are two different offenses, both in terms of the identity of the item actually stolen or converted and its valuation. *See United States v. Wilkins*, 1973 WL 14267, *639 (ACMR 1972) (evidence of theft of wallet did not establish that the wallet's contents were $75.00 as charged; a variance was not permitted since this would change the "nature of the offense charged"); *United States v. Marshall*, No. 08-0779 (C.A.A.F. 2009) (escaping from the custody of one SSG Fleming was a different offense than escaping from the custody of CPT Kreitman). Accordingly, since the Government's own evidence definitively shows that what was on PFC Manning's computer was *not* the USF-I GAL as it existed at the time of the alleged offense, the

Government has failed to introduce any evidence that PFC Manning stole or converted the USF-I GAL.

9. Further, the only evidence adduced as to PFC Manning's stealing or converting of what "looks like" the USF-I GAL[2] is that evidence of ".mil" email addresses were found on the unallocated space on PFC Manning's computer. The Government, through its forensic experts, has established that unallocated space means, in laymen's terms, deleted space on the computer. Mr. Johnson testified that most likely these email addresses were something that the user put on the computer and then subsequently deleted. *See* Testimony of Mr. Johnson. In other words, to the extent that a part of a GAL—(Brigade, Division, or USF-I) may have been located on PFC Manning's computer, the Government's proof shows that it was deleted.

10. The Government has not adduced any evidence that the .mil addresses on the unallocated/deleted space on PFC Manning's computer were transmitted to anyone, much less anyone not authorized to receive it. In particular, the Government has not presented any evidence that the .mil addresses were transmitted by PFC Manning to WikiLeaks. The Government has also not adduced any evidence that WikiLeaks published any of the .mil addresses.

11. The Government has not adduced any evidence that PFC Manning was not permitted to look at, save, or download the .mil addresses. The Government has not established that there was any prohibition placed on PFC Manning, or any other individual, on accessing or downloading the .mil addresses. Indeed, the Government's own witnesses testified that there was no rule or directive stating that soldiers were not permitted to access or download .mil addresses from any GAL. *See* Testimony of CW4 Rouillard. Similarly, CW2 Balonek testified that there was no prohibition against downloading .mil addresses from any GAL. As well, in his Stipulation of Expected Testimony, SA Williamson stated, "The DoD warning banner and legal notice did not explicitly prohibit the downloading of email addresses. I am not aware of any restriction or guidance that precludes one from downloading email addresses from Outlook." *See* Stipulation of Expected Testimony of SA Williamson. The Government has therefore not established that, to the extent that *a* GAL (not the USF-I GAL) was at some point in time in PFC Manning's possession, such possession was somehow "wrongful." *See* Appellate Exhibit 410 ("To 'steal' means to wrongfully take money or property belonging to the United States government with the intent to deprive the owner of the use and benefit temporarily or permanently. ... 'Wrongful' means without legal justification or excuse.).

12. The Government has not adduced any evidence that, to the extent that PFC Manning may have downloaded a GAL, he acted "with the intent to deprive the government of the use and benefit of the records." *See* Appellate Exhibit 410. The fact that .mil addresses were found in the unallocated space (i.e. the fact that the .mil addresses were deleted) and there is no evidence that the .mil addresses were ever transmitted to anyone demonstrates a *lack of intent* to deprive the government of the use and benefit of the records.

[2] But, as established above, could not be the *actual* USF-I GAL because there were far too few email addresses on PFC Manning's computer for it to be the USF-I GAL.

13. The Government has not adduced evidence that, to the extent that PFC Manning may have downloaded and saved .mil addresses, that such actions constitute "stealing" or "converting" of the USF-I GAL within the meaning of 18 U.S.C. §641.

14. Stealing means "to wrongfully take money or property belonging to the United States government with the intent to deprive the owner of the use and benefit temporarily or permanently." "Wrongful" is defined as "without legal justification or excuse." *See* Appellate Exhibit 410. As discussed above, the Government has provided no evidence that PFC Manning "wrongfully" possessed the .mil addresses. Further, the Government has adduced no evidence that the government was deprived of the use or benefit of the .mil addresses. For instance, the Government has adduced no evidence that PFC Manning's alleged actions in downloading the .mil addresses caused the .mil addresses to not be accessible to others or that the government was no longer able to use the .mil addresses. CW4 Rouillard testified that there was no impact on U.S. government resources by the downloading of the .mil addresses. *See* Testimony of CW4 Rouillard. CW4 Nixon testified that the USF-I GAL was always operational, there were never any problems with it caused by PFC Manning's alleged downloading of .mil addresses. *See* 17 June 2013 and 28 June 2013 Testimony of CW4 Nixon. CW4 Nixon also testified that there were never any instructions issued by the U.S. government not to use the USF-I GAL or any portion thereof. *Id.*

15. Similarly, the Government has not introduced any evidence that PFC Manning wrongfully converted the USF-I GAL to his own use or to the use of someone else. As stated in the Appellate Exhibit 410, "Conversion may include the misuse or abuse of property. It may reach use in an unauthorized manner or to an unauthorized extent of property placed in one's custody for limited use. Not all misuse of government property is a conversion. The misuse must seriously and substantially interfere with the United States government's property rights." *See* Appellate Exhibit 410. In *United States v. Collins*, 56 F.3d 1416 (D.C. Cir. 1995) (per curiam), the court explained that "[t]he cornerstone of conversion is the unauthorized exercise of control over property in such a manner that *serious interference* with ownership rights occurs." 56 F.3d at 1420 (emphasis in original). *Collins* involved a Section 641 prosecution of a technical analyst at the Defense Intelligence Agency who used the agency's classified computer system to create and maintain hundreds of documents relating to the analyst's ballroom dance activities. *Id.* at 1418. In the Section 641 prosecution, the Government alleged that the defendant converted, among other things, the agency's computer time and storage space.[3] *Id.* The court held that there was insufficient evidence to support the charge relating to conversion of computer time and storage because the Government did not prove that the defendant's use of the system for non-work related tasks seriously interfered with the Government's property rights in that system:

> [T]he government did not provide a shred of evidence in the case at bar that [defendant] seriously interfered with the government's ownership rights in its computer system. While [defendant] concedes he typed in data and stored information on the computer regarding his personal activities, no evidence exists that such conduct prevented him or others from performing their official duties on the computer. The government did not even attempt to show that [defendant's] use of the computer prevented agency personnel from accessing the computer or

[3] Notably, the prosecution did not allege that the defendant in that case stole or converted the *computer* itself.

storing information. Thus, [defendant's] use of the government computer in no way seriously interfered with the government's ownership rights.

Id. at 1421. Here, the Government has not introduced evidence that PFC Manning released the .mil addresses he allegedly possessed to WikiLeaks or to anyone else not authorized to receive it. The Government has adduced no evidence that, to the extent that PFC Manning may have ever had possession of the .mil addresses, he did *anything* with the .mil addresses, much less anything that seriously and substantially interfered with the United States government's property interest in the USF-I GAL. The Government has not introduced evidence, for instance, that a large number of the ".mil" addresses on the list received spam or were the subject of phishing scams. In short, the Government has introduced no evidence that PFC Manning either stole or converted the USF-I GAL (or any GAL) within the meaning of 18 U.S.C. §641.

16. Viewed in the light most favorable to the Government, the evidence could show that PFC Manning lawfully downloaded .mil addresses from what appears to be the Division GAL and subsequently deleted the document. This would be equivalent to, say, an attorney downloading the AKO addresses of other attorneys in the JAG Corps, doing nothing with that information, and then subsequently deleting that information. The Government's own witness, CW4 Rouillard, testified that this was perfectly acceptable. *See* Testimony of CW4 Rouillard. The information cannot be regarded to have been "stolen" or "converted" where the original accessor had authorization to download the information, did not transmit the information, and subsequently deleted the information.

17. Further, the Government has introduced no relevant evidence of valuation. It did elicit general testimony about the potential for spearfishing if email addresses are released, but did not put a monetary value on this.[4] Indeed, it withdrew is proffer of CW4 Rouillard as an expert on value. At one point in CW4 Rouillard's testimony, the Government proffered that the "United States is not arguing that value is measured in dollar amounts." Under section 641, the Government must establish value *in dollar amounts*. It cannot present generalized assertions that .mil email addresses have value. It must establish that the particular email addresses that PFC Manning is alleged to have stolen or converted had a value in excess of $1000 at the time of the alleged offenses.

18. The Government has not established a legitimate "cost of production" for the copy of the email addresses that PFC Manning allegedly downloaded. For the reasons identified in the Defense's Motion for a Directed Verdict on the remaining §641 offenses, it is clear that to the extent that PFC Manning stole or converted anything, it had to be a *copy* of a list. Accordingly, it is a *copy* of the list that must be valued for the purposes of the "cost of production" measure of valuation. *See United States v. DiGiglio*, 538 F.2d 972 (3rd 1976) (noting that copies made using government resources, including photocopiers, were "records" for the purposes of §641 and that these copies themselves needed to be valued).

[4] Indeed, the Government was correct not to do so, since this is not an acceptable means of valuation. The threat to cyber-security does not demonstrate the monetary value of an item under any acceptable and recognized theory of valuation.

19. Nor has the Government established the value of the email addresses on the thieves' market in May 2009 (the time of the alleged offense). The Government offered Mr. Lewis as an expert on value of all types of information involved in this case, including the GAL. Mr. Lewis is a counter-intelligence expert who has no knowledge of, or expertise in, valuing email addresses. He does not consider himself to be a valuation expert, nor has he ever been asked to value email addresses before. Up until last week, Mr. Lewis maintained that he had no idea why he was being called to testify. Mr. Lewis' valuation "methodology" cannot even be called a methodology. Mr. Lewis did not do relevant research, consider context, or attempt to verify any of his opinions. Accordingly, any testimony from Mr. Lewis regarding the value of a GAL generally does not help establish value of the GAL any more than guessing at the value of the GAL.

20. In *United States v. Wilson*, 284 F.2d 407 (4th Cir. 1960), the defendant was charged with the theft of 72 rifles at a time when Section 641 only required the property to have value in excess of $100 for a felony conviction. *Id.* at 408. Furthermore, the indictment alleged that the value of the 72 rifles was $7,500. *Id.* at 407. The Government, however, offered no evidence at trial on the value of the rifles, but the jury still found the defendant guilty on the felony charge. *Id.* at 408. To reach the conclusion that the rifles had value in excess of $100, the jury only needed to infer that each rifle had a value of at least $1.39. *See DiGilio*, 538 F.2d at 980-81 (discussing *Wilson*). The Fourth Circuit vacated the defendant's 7 ½-year sentence because no evidence of the value of the rifles was offered. *Wilson*, 284 F.2d at 408. The *Wilson* Court explained its rationale as follows:

> The Government . . . failed to produce any evidence whatsoever as to the value of the stolen weapons. We are asked to take judicial notice that 72 rifles are worth more than $100.00, but we cannot on the basis of anything in the testimony form a judgment as to value for the purpose of supporting the greater penalty. Nor, in the absence of any proof of value, could the jury be permitted to speculate on this point merely from the appearance of the articles. A fact which distinguishes a violation punishable by imprisonment for not more than one year from a violation punishable by imprisonment for ten years cannot be permitted to rest upon conjecture or surmise. In order to sustain the imposition of the higher penalty, it was as incumbent upon the Government to prove a value in excess of $100.00 as it was to prove the identity of the defendant as the perpetrator of the crime, or the ownership of the property.

Id. The Government's failure to introduce specific evidence on value, rather than generalized assertions of value, is fatal to its 18 U.S.C. §641 claim.

21. Finally, the Government has adduced no evidence that PFC Manning's act of downloading the .mil addresses and then subsequently deleting it is of such a nature to bring discredit to the Armed Forces. The Government cannot rely on the act itself to establish the service discrediting nature of the offense.

CONCLUSION

22. In light of the foregoing, the Defense requests this Court grant the requested R.C.M. 917 motion for Specification 16 of Charge II.

Respectfully submitted,

DAVID EDWARD COOMBS
Civilian Defense Counsel